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NG THAU SHING

v.

GEORGE JUSTINE & OTHER CASES

*b*HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[ORIGINATING SUMMONS NO: S24-58-1999]
2 NOVEMBER 2004*c*

CIVIL PROCEDURE: Parties - Locus standi - Plaintiff seeking declaratory relief on behalf of estate - Letters of administration not yet issued to plaintiff - Whether plaintiff clothed with locus standi to maintain such declaratory action

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EVIDENCE: Expert evidence - Need for - Plaintiffs alleging forgery of signatures on statutory document - Whether plaintiffs under legal obligation to lead expert evidence to disavow impugned signatures

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LAND LAW: Alienation and incidents - Validity of - Subsequent procedural steps to application for alienation of land carried out by unauthorized person on behalf of alienation applicant - Whether subsequently issued land title in compliance with statute

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LAND LAW: Alienation and incidents - Validity of - Whether doctrine of bona fide purchaser without notice would apply to purported sale of land pending alienation

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LAND LAW: Sale of land - Validity of agreement - Land pending alienation at time of purported sale - Whether subject matter of purported sale merely contractual rights of applicants for alienation - Whether doctrine of bona fide purchasers for value without notice applicable to purported purchaser of such land

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All four actions herein were heard together. All four actions concerned disputes arising out of land alienation applications cum purported sale transactions. Apparently, by an agreement dated 10 September 1996 ('the said agreement'), 16 land applicants, including the plaintiffs, sold their interest under various land applications to one Campo Sdn. Bhd. ('Campo'), purportedly *vide* a Power of Attorney dated 11 of November 1991 granted to one George Justine @ Ghani Affandi ('George'), All Memoranda of Transfers and other relevant documents were also executed in escrow by George, as Attorney. Further

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thereto, by an agency agreement dated 10 September 1996, George, represented himself as Sale Agent for the 16 land applicants to Campo. Campo in turn, sold those pieces of land to one Jasutera Sdn Bhd ('Jasutera'). However, Jasutera was informed by solicitors for the plaintiffs that six land applicants had alleged that their signatures in the Power of Attorney had been forged and that a police report had been lodged. Notwithstanding this, sixteen titles representing the 16 applications were subsequently issued and registered with George signing for all 16 titles. Fifteen of these titles were eventually transferred and registered in favour of Jasutera. One land title was not so transferred in view of a Collector's Caveat lodged by one Ng Thau Shing ('Ng'). The plaintiffs in all four actions, unanimously applied *inter alia*: (i) to declare the Power of Attorney in favour of George null and void; (ii) to declare all transactions entered into pursuant to the Power of Attorney null and void; (iii) for an order to compel the Director of the Lands and Surveys Department to cancel the land titles and documents issued pursuant to the said Power of Attorney. The plaintiffs alleged fraud and/or forgery perpetrated by George in the drawing up of the Power of Attorney. In respect of the first action, Ng as plaintiff denied ever signing the Power of Attorney and alleged that the signature therein was not his. Ng also denied knowing one Ahmad Read, the Commissioner for Oaths who had purportedly witnessed his signature. Ng further gave an account of what transpired after he took positive actions to query the said Power of Attorney including an admission by George that he did in fact forge the signatures therein. There was apparently also an offer made to Ng to settle the matter amicably. With regard to the second action, the plaintiff – Vera Primus ('Vera'), also denied that her purported signature in the Power of Attorney was hers. She alleged that she did not know George and that on the day of the purported execution, she was working in Tawau. She further alleged that she did not know Ahmad Read. Concerning the third action, the plaintiff – Ungot Linitok ('Ungot'), as personal representative of his deceased mother – Kusiah bte Angawai – alleged that his late mother could not have signed the Power of Attorney in November 1991 since she died in January 1986, and in any case she was illiterate. As regards the fourth action, the plaintiff – Sado @ Anjiri bin Liwas @ Lewas ('Sado'), the administrator of his deceased father's estate – claimed that his late father could not have signed the Power of Attorney in November 1991 since he died in March 1986. A preliminary objection was raised in respect of the third action, in that it was alleged that: (a) Ungot could not understand English; (b) his affidavit was in breach of Order 41 r. 1(i) of the Rules of the High Court 1980; and (c) that Ungot had no *locus standi* since he had commenced the action without first obtaining the 'Jadual Tiga'. Also, of particular importance in this case,

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- a* given that the alienation of land was involved, was whether Campo and Jasatera could rely on the doctrine of *bona fide* purchaser for value without notice.

Held (allowing the plaintiffs' applications substantially with costs):

- b* [1] Whether the signatures of the plaintiffs in the said Power of Attorney were forged or not would depend on the plaintiffs, and George and anyone who had personal knowledge of its execution. Jasutera or Campo would not at all be in a position to know how the signatures came into the Power of Attorney since that happened before they were involved. Hence, their
- c* assertions would be merely conjecture. (p 97 c)
- d* [2] With regard to the first two actions, there were direct denials by the plaintiffs of their signatures on the Power of Attorney, as supported by circumstantial evidence, including the evidence of George's subsequent conduct. It was unreasonable for the plaintiffs and neither were they under any legal obligation to lead expert evidence to disavow their impugned signatures. In any event, expert opinion would only assist the court to come to an opinion or a finding of fact. It is not to be taken as conclusive of such fact. George's rebuttal evidence was clearly hearsay which in fact proved nothing. The presumption under s. 85 of the Evidence Act 1950
- e* could not also apply since it was rebutted by the plaintiffs' denial that the signatures were theirs. (pp 98 e-g & 99 d-f)
- f* [3] There was also an admission by George that in 1991 he had forged his father's signature on the Power of Attorney. His failure to state whether there were any signatures by the other plaintiffs at the time he forged his father's signatures – when such fact was clearly within his personal knowledge – would result in s. 114(g) of the Evidence Act 1950 being invoked against him. (p 100 f-g)
- g* [4] On a balance of probabilities, the signatures of the plaintiffs in the first two actions were clearly forged on the Power of Attorney. However, there was no need for the High Court to find who had forged such signatures. (p 101 d)
- h* [5] With regard to the third and fourth actions, the persons named in the Power of Attorney were clearly dead in 1991. This would give an irresistible conclusion that their purported signatures in the said Power of Attorney were forged. (pp 101 f & 102 f)
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- [6] Concerning the preliminary objection in the third action, it is well entrenched that technicalities should not come in the way for substantial justice to be done. Also, Ungot was merely seeking a declaration on the status of the signature of the deceased, with the consequential relief that the title deed should be cancelled if the signature is found to be forged. Ungot did not seek specific relief such as damages. Thus following *Ooi Jim & Anor v. Ai Eit & Ors* [1977] 2 MLJ 105 (FC), Ungot had the *locus standi* to commence the action. (p 105 f-g) a
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- [7] The procedure in land alienation is that upon obtaining approval, an applicant is required to take some further steps before an issued document of title can be obtained. For instance, besides payments of all dues, survey works must also be carried out and all relevant official documents, including a draft issued document of title, must be signed to signify the acceptance of all the terms and conditions therein. Thus, if the signing of such documents was done by a person who was not authorized by a successful land applicant, the latter could not be expected to be bound by those terms and conditions since such act was not his. In short, the issued document of title would have been issued not in compliance with the provisions of the statute. Since the signatures of Ng, Vera and the deceased in the Power of Attorney were forged, and the use of that instrument by George or his purported substitute *vide* a substituted power of attorney to secure the issuance of the issued document of title, the inescapable conclusion was that those acts would not be that of Ng, Vera or the deceased. (p 111 e-g) c
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e
- [8] The doctrine of *bona fide* purchaser for value without notice could not be relied upon. At the time of entering into the sale agreement it was not in dispute that the issue documents of title had not been issued by the Lands and Surveys Department. Hence, at that point in time the subject matter of the agreement was, at best, only the contractual rights of the land applicants since there was no title to purchase as yet. The position of Campo and Jasutera was further weakened on their reliance of the doctrine because it was not in dispute that before the issuance of the issue documents of title Jasutera was informed and in fact a caveat was lodged by Ng. In any event in view of the forgery in the Power of Attorney, George was not authorized to enter into the sale agreement with Campo on behalf of Ng, Vera and the deceased. Accordingly that purported sale agreement was void. Thus, the doctrine of *bona fide* purchaser for value without notice did not even come into play. (p 112 b-f) f
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a Case(s) referred to:

Abdulmajid v. Har Abdulrazak [1971] 2 MLJ 228 (**refd**)
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC (**refd**)
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (**refd**)
Chai Koi v. Wong Yit Chen & Anor [1964] 1 MLJ 441 (**refd**)
Chong Pak Kwan v. Kong Chung Loi v. Kong Sung Loi & Ors [2002] MLJU 435

b (refd)

Comptroller of Income Tax v. Van Tai Min [1965] 1 MLJ 255 (**refd**)
Dowse v. Attorney-General, Federation of Malaya [1961] 1 MLJ 249 (**refd**)
Dr Shanmuganathan v. Periasamy Sithambaram Filial [1997] 3 MLJ 6 (**refd**)
Gian Singh & Co Ltd v. Banque De L'Indochine [1974] 2 MLJ 177 (**refd**)
Hong Kong Bank v. Nor Harizan [1999] 6 CLJ 466 HC (**refd**)

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Jamaliah Hj Mahsudi & Ors v. Sivam Munusamy & Ors [1999] 5 MLJ 729 (**fol**)
Majumder v. Attorney-General of Sarawak [1969] 1 MLJ 132 (**refd**)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC (**refd**)
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA (**refd**)

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Ooi Jim & Anor v. Ai Eit & Ors [1977] 2 MLJ 105 (**fol**)
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC (**refd**)
Tee Say Poh v. Jais Hj Salleh [1939] MLJ 330 (**refd**)
Yang Lak Man v. Yang Paw Mun [1999] 7 CLJ 131 HC (**refd**)

e Legislation referred to:

Evidence Act 1950, ss. 85, 101, 114(e), (g)
Land Ordinance (Cap 68) (Sabah), s. 88
Rules of the High Court 1980, O. 20, O. 41 rr. 1(i), 5(2)

(Originating Summons No: S24-58-1999)

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For the plaintiff - Datuk Douglas C Primus; M/s Lee & Thong
For the defendant - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co
For the intervener - Roland Cheng Ho Wah; M/s Roland Cheng & Co
For the 3rd party - Roderic A Fernandez; M/s Shelley Yap Leong Tseu, Chong Chia & Co
For the 4th party - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

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(Originating Summons No: S24-59-1999)
For the plaintiff - Datuk Douglas C Primus; M/s Lee & Thong
For the defendant - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co
For the intervener - Roland Cheng Ho Wah; M/s Roland Cheng & Co
For the 3rd party - Roderic A Fernandez; M/s Shelley Yap Leong Tseu, Chong Chia

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& Co
For the 4th party - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

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(Originating Summons No: S24-31-2000)

For the plaintiff - Datuk Douglas C Primus; M/s Lee & Thong

For the 1st defendant - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

For the 2nd defendant - Roland Cheng Ho Wah; M/s Roland Cheng & Co

For the 3rd party - Roderic A Fernandez; M/s Shelley Yap Leong Tseu, Chong Chia & Co

For the 4th party - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

(Originating Summons No: S24-47-2000)

For the plaintiff - Datuk Douglas C Primus; M/s Lee & Thong

For the 1st defendant - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

For the 2nd defendant - Roland Cheng Ho Wah; M/s Roland Cheng & Co

For the 3rd defendant - Lee Chuen Wan; M/s Shelley Yap Leong Tseu, Chong Chia & Co

For the 3rd party - Roderic A Fernandez; M/s Shelley Yap Leong Tseu, Chong Chia & Co

For the 4th party - Gabriel Ho Ken Wun; M/s Gabriel Ho & Co

Reported by Andrew Christopher Simon

JUDGMENT

Richard Malanjum J:

Introduction

There are four actions before me all commenced by way of originating summons. They are O.S. No. S24-58 of 1999 (the first action), O.S. No. S24-59 of 1999 (the second action), O.S. No. S24-31 of 2000 (the third action) and O.S. No. S24-47 of 2000 (the fourth action).

In all these actions the reliefs sought for by the respective plaintiffs are identical, to wit, *verbatim*:

1. That the Power of Attorney dated the 11th day of November 1991 be declared null and void.
2. That all consequential acts made or purported to be made or carried in pursuant to the abovesaid Power of Attorney be declared null and void and of no consequence.
3. That the Director of the Lands and Surveys Department do cancel the land titles documents issued purportedly pursuant to the said Power of Attorney.
4. That the Defendant do pay all costs of this Application.
5. Any other directions that the Court may deem fit.

- a* The parties have agreed for these actions to be heard jointly since the crucial issues are intertwined.

b For ease of reference in this judgment where reference is made to more than one plaintiff they will collectively be referred to as ‘the plaintiffs’ but individually by their respective first names. The dead persons whose Estates are represented by the plaintiffs in the last two actions will be referred to as the deceased. The same applies to the various defendants but individually will be referred to as follows:

- c* (i) George Justine @ Ghani Affandi – the 1st defendant in all the actions and as the ‘fourth party’ in the second action, as ‘George Justine @ Ghani Affandi’;
- (ii) Jasutera Sdn. Bhd. – the 2nd defendant and having applied as intervener as well in the first and second action, as ‘Jasutera Sdn. Bhd.’; and
- d* (iii) Campo Sdn. Bhd. – the third party as ‘Campo Sdn. Bhd’.

The action against HSBC Bank Malaysia Bhd. was discontinued soon after the commencement of the hearing.

e Initially the first and second actions were heard and arguments concluded. However subsequent applications were made to intervene by Jasutera Sdn. Bhd. These were not objected to by the plaintiffs provided that arguments by Jasutera Sdn. Bhd. had to be made in the third action and any decision of the court in the third action would be binding on Jasutera Sdn. Bhd. in the first two actions. Learned counsel for Jasutera Sdn. Bhd. agreed to the term and learned counsel for George Justine @ Ghani Affandi did not object to the agreement. Further, third party notices were issued to the third party as well as to the fourth party. And it was noted by the court that any order made in relation to such applications in any of the actions would have binding effect on the other actions.

g Application was also made by learned counsel for the plaintiffs to have the third and fourth actions heard jointly. And he further suggested that the parties should come to a set of agreed facts and issues to be tried and thereafter submissions to be made by the respective counsel. That mode of proceeding was accepted.

h Although it was suggested, albeit feebly, that these actions should be converted to writ actions, the parties proceeded relying on the respective affidavits filed in presenting their arguments. In any event I was not persuaded in the course of hearing that these actions should be converted to writ actions.

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I also noted that in their respective letters dated 20 August 2002 the solicitors for the parties expressed the following agreement as follows:

- (a) from the solicitors of the plaintiffs – ‘Insofar as the defendants and third party are concerned in the event of the High Court ruling in favour of the plaintiffs, the issue of liability quantum of damages and indemnity needs to be clarified eg, who shall assess the quantum ... This direction ... can be given in Yang Ariff’s ruling/judgment’;
- (b) from the solicitors for Jasutera Sdn. Bhd. and Campo Sdn. Bhd. – ‘that in the event that His Lordship makes his ruling, there will be further directions to be made regarding the liability (if any) of the 3rd party and the 4th party pursuant to the 3rd party notice and 4th party notice by which the defendants will seek indemnity and/or contribution for any liability imputed hereto’.

The bundles of agreed facts, disputed facts and agreed issues to be tried were filed in respect of the third action. However they are also common and relevant to the other actions. Thus I propose to rely on them where appropriate for all the actions.

The Agreed Facts

The agreed facts are as follows, verbatim:

- (i) By an agreement dated 10th September 1996, sixteen (16) land applicants including the Plaintiffs sold their interest under various purported land applications to a total area of approximately 456 acres more or less in the District of Beluran, to the Third Party Campo Sdn. Bhd. purportedly *vide* a Power of Attorney granted to the 1st Defendant, George Justine @ Ghani Affandi, dated the 11th of November 1991. Pursuant to the said Agreement all the Memoranda of Transfers and other relevant documents were also executed in excrow by the Attorney.
- (ii) The fourth party, George Justin @ Ghani Affandi confirmed on 10 September 1996 that the Power of Attorney dated 11 November 1991 executed by the 16 land applicants remain valid and has not been revoked.
- (iii) By an agency agreement dated 10 September 1996, the Fourth Party, represented himself as Sale Agent for the 16 land applicants to Campo Sdn. Bhd.
- (iv) Pursuant to the said Sale and Purchase Agreement and the said Agency Agreement the Third Party, Campo Sdn. Bhd. has paid the 1st Defendant or paid for his account a total sum of RM428,380.90 between 29th June, 1996 and 12th August, 1997. The 2nd Defendant paid Campo Sdn. Bhd. the sum of RM150,000.00 on 25th September, 1996 and the sum of RM361,237.00 on 11th August, 1997.

- a** (v) By a Sale and Purchase Agreement dated 27th September, 1996, the Third Party, Campo Sdn. Bhd. sold the said lands totaling approximately 456 acres to Jasutera Sdn. Bhd. Messrs. Chin Lau Wong & Foo informed the 2nd Defendant, Jasutera Sdn. Bhd. on 4th December, 1996 that the premium for 16 titles is RM172,178.50. The cheque for RM172,178.50 was issued to the Director of Lands & Surveys by Jasutera Sdn. Bhd.
- b** The quit rent for all 16 titles from 1977 to 2000 was also paid by the Jasutera Sdn. Bhd. between 20th January, 1997 and 24th January, 2000. George Justin signed for all 16 titles on the 10th December, 1996. All 16 titles were registered between 12th April, 1997 and 16th July, 1997.
- c** (vi) By a Substituted Power of Attorney dated 22nd April, 1997, the Fourth Party, George Justin @ Ghani Affandi appointed Campo Sdn. Bhd. as his substituted Attorney in respect of the 16 land applicants including the Plaintiffs.
- d** (vii) On 19th July, 1997, Campo Sdn. Bhd. forwarded the 16 title deeds to the 16 pieces of land to Jasutera Sdn. Bhd.
- (viii) By a Letter dated 1st August, 1997, Campo Sdn. Bhd. issued an indemnity to Jasutera Sdn. Bhd. for the sum of RM774,537.00 and all damages costs and losses in the event that the Memorandum of Transfer for the 16 land titles cannot be registered for any reason whatsoever.
- e** (ix) By an addendum dated 5th August, 1997, Jasutera Sdn. Bhd. and Campo Sdn. Bhd. agreed to vary the terms of the Sale and Purchase to permit transfer of title only after the said lands have been fully planted.
- f** (x) On the 4th of March 1998 Messrs Lee & Thong, Solicitors for the Plaintiffs informed Jasutera Sdn. Bhd. that six (6) land applicants had alleged that their signatures that appeared in the Power of Attorney dated the 11th November, 1991 had been forged and that a police report had been lodged. The 2nd Defendant informed the Plaintiff that they were *bona fide* purchasers for value. The sixteen (16) titles were forwarded to the 2nd Defendant on 21st July, 1997. The 2nd Defendant registered Caveat against all 16 titles on 22nd May, 1997.
- g** (xi) By a Supplementary Agreement dated 24th November 1998, Campo Sdn. Bhd. and Jasutera Sdn. Bhd. agreed to effect transfer of 15 titles only and to effect transfer of the 16th title after the Registrar's caveat has been removed by Campo Sdn. Bhd. The Registrar's Caveat was registered against CL. 085322934 (Ng Thau Shing @ Jimmy Ng Thau Syn) on 15th October, 1997. There were no Registrar's Caveat or any Caveats by any of the Plaintiffs (except by the 2nd Defendant) against the other fifteen (15) titles.
- h**
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- (xii) By 16 Memoranda of Transfer dated the 24th November, 1998 George Justine @ Ghani Affandi (*vide* the Power of Attorney dated 11th November, 1991) transferred all 16 pieces of land to Jasutera Sdn. Bhd. The Memorandum of Transfer for the 15 titles were duly transferred and registered on 26th January, 1999 except for CL. 085322934 registered under the name of Ng Thau Shing @ Jimmy Ng Thau Syn who had lodged a Collector's Caveat. The Collector had on the 13th of July, 2000 dismissed Jasutera Sdn. Bhd.'s application to vacate the said Caveat. a
- (xiii) Hj Mohd Affandi, Liwas bin Tabugan and Rusiah binte Angawai had passed away before the 11th November 1991. b
- (xiv) All the sixteen (16) Plaintiffs did not pay any monies for the registration, survey and planting of the land. c

The Disputed Facts

The parties also agreed to a list of disputed facts as follows, verbatim,:

- (a) Whether the signatures of Kusiah @ Rusiah Angawai and Lewas @ Liwas bin Tabugan contained in the Power of Attorney dated 11th November 1991 were forged? d
- (b) Whether the Power of Attorney dated 11th November, 1991 was prepared in 1986 and the various signatures were obtained between 1986 and 1991? e
- (c) Whether Campo Sdn. Bhd. and Jasutera Sdn. Bhd. are *bona fide* purchaser for value and without notice of any defect in the Power of Attorney of George Justin @ Ghani Affandi and Campo Sdn. Bhd.? f
- (d) Whether Sado @ Anjiri bin Liwas @ Lewas knew of the alleged fraud by George Justin @ Ghani Affandi on 27th June, 1996? Whether Ng Thau Shing @ Jimmy Ng Thau Syn knew the alleged fraud by George Justin @ Ghani Affandi on 4th August, 1996? g
- (e) Whether the Plaintiffs are the actual original applicants for the lands? h
- (f) When did the various Plaintiffs become aware of the alleged fraud committed purportedly by George Justin @ Ghani Affandi? i
- (g) When did the various Plaintiffs inform the Defendant of the defect in the alleged Power of Attorney dated 11th November 1991?

I would say that these 'disputed facts' are in their true nature facts which this court has to find in coming to its conclusion. h

a Agreed Issues To Be Tried

As regards the issues to be determined they are as follows, verbatim:

- (i) Whether the Limitation Ordinance (Sabah) bars the Plaintiffs, Sado @ Anjiri bin Liwas @ Lewas and Ungot bin Linitok from setting aside the transfer to Jasutera Sdn. Bhd. on grounds of time bar?
- b**
- (ii) Whether the Plaintiff (Ungot bin Linitok) has *locus standi* to maintain his cause of action on grounds that he had filed his action before receipt of the Letter of Administration?
- (iii) Whether Ghani Affandi had misrepresented and defrauded Campo Sdn. Bhd. as to the validity of the Power of Attorney?
- c**
- (iv) Whether Campo Sdn. Bhd. and Jasutera Sdn. Bhd. are *bona fide* purchasers for value without notice of defect in the Power of Attorney to whom good title in the 16 lands had passed?
- d**
- (v) Whether the presence of one forged signature nullifies the whole Power of Attorney?
- (vi) Whether in all the circumstances of this case and in equity the Plaintiffs are entitled to the equitable declarations they seek?

e I note that these agreed issues are questions of law which the ‘disputed facts’ have some bearing as well. Hence, I do not propose to deal with the agreed issues as given in seriatim. Suffice if I were to consider the core issue which in my view would dispose of these actions. I also note that during the hearing of the first two actions Mr. Gabriel Ho, learned counsel for George Justine @ Ghani Affandi, submitted that the actions should be converted into writ actions. His reasons were, *inter alia*, that the plaintiffs failed to satisfactorily explain for their inactions after submitting their land applications, that there was no admission of forgery on the part of George Justine @ Ghani Affandi and that the plaintiffs should be estopped from denying the authenticity of the signatures since they had demanded payment.

g However this submission was not made for the other two actions. I can only surmise that such change was due to the parties having settled the agreed and disputed facts as well as the issues to be tried. As such I do not think it is now necessary for me to make any ruling on the point. At any rate having read the various affidavits and the agreed and ‘disputed facts’ I do not think

h there is a need to lead evidence in order to determine the crucial issues to be tried including the ‘disputed facts’. (See: *Abdulmajid v. Har Abdulrazak* [1971] 2 MLJ 228).

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Mr. Ho and supported by Mr. Roland Cheng, learned counsel for Jasutera Sdn. Bhd. also raised a preliminary objection at the commencement of the hearing for the third action. His points were that Ungot could not and does not understand English, that the affidavit of Ungot was sworn to before the sealing of the originating summons and not sworn in existing cause or matter in breach of O. 41 r. 1(i) of the Rules of the High Court 1980 and that Ungot commenced the action without first obtaining the 'Jadual Tiga' which would have given him the *locus standi*.

In reply Datuk Douglas Primus, learned counsel for Ungot submitted that there was nothing in the affidavit of Ungot to say that he did not understand English. Further, it was pointed out that his signature was in Romanized alphabet. As for the signing of the affidavit he cited the cases of *Hong Kong Bank v. Nor Harizan* [1999] 6 CLJ 466 and *Yang Lak Man v. Yang Paw Mun* [1999] 7 CLJ 131. And on the third point he said that the application for 'Jadual Tiga' was being processed and in any event Ungot was merely acting as the personal representative of the deceased.

My short answer to the preliminary objection is that technicalities should not come in the way for substantial justice to be done. That has now been well entrenched. (See: *Megat Naimuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645). But to be fair to learned counsel that case came later. Anyway with or without that case I would have overruled the preliminary objection on the first two points as I do not think there was any undue prejudice suffered by George Justine @ Ghani Affandi and Jasutera Sdn. Bhd. I will deal with the third point later.

The Core Issue – Was The Power Of Attorney Dated 11 November 1991 (The Said Power Of Attorney) Forged?

Notwithstanding the first and second actions were heard first I propose to deal with the core issue, that is, whether the said Power of Attorney was forged, since it has a crucial bearing on all the actions. And forgery in this judgment would be limited to whether the signatures of the plaintiffs in the first two actions and that of the deceased in the last two actions were forged. If my finding is in the affirmative, then I will proceed to consider the specific questions peculiar to each of these actions. I also bear in mind that the plaintiffs in the first two actions are still alive but not for the latter two actions.

In considering this core issue there are some subsidiary issues to note, namely, the time of the making of the Power of Attorney and the legal implication if only some of the signatures therein were forged.

a In the first two actions the plaintiffs directly denied ever signing the said Power of Attorney. In respect of the last two actions the stand is that the deceased were dead at the time of its execution. I am therefore of the view that on this issue it is very much a question of who to believe, that is, either the plaintiffs or George Justine @ Ghani Affandi.

b **The Affidavits**

In his affidavit in support of his originating summons sworn to on 2 August 1999 Ng swore, *inter alia*, that he never signed the said Power of Attorney and that the signature therein was not his. And though he said that he knew George Justine @ Ghani Affandi, he never met him to sign the said Power of Attorney. Ng also denied knowing one Ahmad Read the Commissioner for Oaths who had purportedly witnessed his signature. And Ng gave an account of what transpired after he took positive actions to query the said Power of Attorney including the admission by George Justine @ Ghani Affandi that he did forge the signatures therein. There was also an offer to Ng to settle the matter.

d Vera in her affidavit in support sworn to on 30 July 1999 denied that the purported signature in the said Power of Attorney was hers. Her reasons were that she did not know George Justine @ Ghani Affandi, that on the day of the purported execution she was working in Tawau and that she did not know one Ahmad Read.

e In respect of the third action Ungot in his affidavit in support sworn to on 4 July 2000 stated, *inter alia*, that he is the personal representative of his late mother, Kusiah bte Angawai and have been duly authorized by his other siblings except one sister Urah bte Linitok to make the affidavit. And in his affidavit Ungot said that on 29 January 1986 his mother passed away at Kg. Masak, Keningau. A copy of her late registration of death certificate No. 04001 was also exhibited and marked 'UBL2'. In addition to the death certificate Ungot also exhibited the certification of the death by the Ketua Kampong Anjiri bin Lewas @ Sado which was marked as 'UBL3'.

f And Ungot averred that his late mother could not have signed the said Power of Attorney for the following reasons:

- g* (a) she was already dead in November 1991; and
- h* (b) she was illiterate and could not have signed.

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As regards the fourth action Sado in his affidavit sworn to on 20 October 2000 stated that he is the administrator of the estate of his late father, Liwas bin Tabugan @ Lewas bin Tabugan @ Lawas bin Tabugan and that he had been duly authorized by his brothers and sisters to make the affidavit. And Sado went on to state that his late father died on 12 March 1986 at Kg. Masak, Keningau. The death was duly registered and the death certificate No. 66/86 was exhibited as 'AL1'.

Since his father had already passed away in November 1991 the Sado averred that he could not have signed the said Power of Attorney.

Responding to the assertions by the plaintiffs George Justine @ Ghani Affandi had these to say in his affidavits in opposition. In respect of the first action he stated in his affidavit affirmed on 5 November 1999 thus:

- (i) that his mother was his source of information in relation to the application for the lands in issue;
- (ii) that it was his uncle one Francis Angkangon who was asked by his mother in return for a percentage in the lands applied for to obtain the signatures in the said Power of Attorney and that it was his uncle who arranged for the Commissioner for Oaths to attest the signatures;
- (iii) that the signatures therein could not have been on 11 November 1991 since that date was for convenience only;
- (iv) that according to his mother the original applicants for the lands were she and 15 other family members in 1976 and that she did not know the persons in the first two actions. However his mother had no knowledge of how and when the change took place to include the plaintiffs and few other strangers. It was asserted by his mother that the plaintiffs in the first two actions did not submit any land application form for land to be alienated by the State Government;
- (v) that it was suggested by his uncle that instead of resolving the change in the original applicants it would simplify things if the present applicants gave a power of attorney to him, George Justine @ Ghani Affandi;
- (vi) that it was his mother who paid for all the expenses, including the registration fee, the premium for the TOL for the land in question and expenses incurred by his uncle to get the signatures;

- a* (vii) that he had sold the lands to Campo Sdn. Bhd. at RM400 per acre;
- (viii) that he denied ever admitting to Ng of forging the signatures in the said Power of Attorney;
- b* (ix) that he did meet Ng on 12 April 1998 and the latter did not complain that his signature was forged and that Ng only complained when Campo Sdn. Bhd. or Jasutera Sdn. Bhd. refused to pay RM5,000 per acre as demanded through his solicitors;
- (x) that he signed on behalf of his late father in the said Power of Attorney since he was the beneficiary and he was told by the Commissioner for Oaths that he could do so;
- c* (xi) that he admitted the death of the deceased in respect of the last two actions but he did not know which of their children signed on the said Power of Attorney;
- d* (xii) that there is bad faith on the part of Ng in that he is inconsistent. One moment he wanted payment failing which he sought for the cancellation of the title deed; and
- (xiii) that by demanding for RM5,000 per acre Ng should now be estopped from denying that the signature in the said Power of Attorney is not his.
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f In respect of the second action the reply by George Justine @ Ghani Affandi in his affidavit in opposition affirmed on 5 November 1999 is almost identical to that of the his affidavit in the first action. And he stated that Vera could have signed the said Power of Attorney in Tawau on another date and not as stated therein.

g I note that although George Justine @ Ghani Affandi made reference to his mother and uncle neither of them gave any affidavit in respect of the first two actions.

h As for the third action George Justine @ Ghani Affandi stated in his affidavit in opposition affirmed on 16 August 2000 what he had alluded to in his affidavits for the first two actions. In particular he said that the signature could have been by one of the beneficiaries of the deceased. He also raised the issue of Ungot having no 'jadual tiga' and hence no legal standing to commence the action. He averred that Ungot is illiterate and does not understand English.

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For this third action Urah bte Lamitoh @ Noraidah Linitok the mother of George Justine @ Ghani Affandi gave an affidavit affirmed on 16 August 2000. She repeated what was earlier on asserted by George Justine @ Ghani Affandi in his affidavits as coming from her. In particular she said that she was not certain if her late mother was one of the original applicants. And she also questioned the authority of Ungot in commencing the action when she gave no consent for him to act as the representative of her late mother.

In respect of the fourth action George Justine @ Ghani Affandi affirmed an affidavit in opposition on 10 April 2001. And he repeated substantially what he had said in his other affidavits in particular for the third action. His mother too gave an affidavit affirmed on 10 April 2001 with the contents similar to that she gave for the third action.

As for Campo Sdn. Bhd. and Jasutera Sdn. Bhd. on this issue of forgery they took the reasons given by George Justine @ Ghani Affandi in his affidavits with the emphasis that the signatures could have been given earlier than the date in the said Power of Attorney. And it was even suggested that in respect of the deceased their signatures could have been given before their respective deaths.

(i) The First Two Actions

The Contentions

In respect of the first two actions it was the submissions of Datuk Primus, learned counsel for the plaintiffs, that the affidavits of George Justine @ Ghani Affandi contained hearsay evidence and should not be admitted. He argued that O. 41 r. 5(2) of the Rules of the High Court 1980 should not apply as the action was not an interlocutory matter. According to learned counsel while he was not disputing on the events that occurred after the discovery of the forgery, he contended that George Justine @ Ghani Affandi knew nothing of the surrounding circumstances of how the signatures of the plaintiffs were obtained. In particular it was submitted that George Justine @ Ghani Affandi only repeated what he claimed to have been told by his mother without the mother making any affidavit herself. And it was also highlighted that George Justine @ Ghani Affandi only stated that it was his uncle, Francis Angkangon, who arranged for the signatures of the plaintiffs to be obtained. Yet no affidavit was filed by the uncle. Similarly there was also no affidavit from the Commissioner for Oaths who attested the purported signatures of the plaintiffs. Thus it was submitted that there was nothing to suggest that the said Power of Attorney was regularly and properly executed.

- a* On the question of the demand for RM5,000 per acre by the plaintiffs Datuk Primus contended that it was only an attempt to settle the matter out of court in response to the letter of George Justine @ Ghani Affandi, 'JN8', wherein he informed the solicitors of Ng that a settlement had been reached during his meeting with Ng. And learned counsel went on to say that 'JN8' was not
- b* consistent with the averment in para. 11 of the affidavit in opposition of George Justine @ Ghani Affandi. It was further added that if it was only the price that was in disputed as alleged then there would have been nothing to settle.
- c* Learned counsel pointed out that the admission by George Justine @ Ghani Affandi in his affidavits that the purported signature of his late father in the said Power of Attorney was his doing should be taken as a clear proof of forgery since his reason for so doing could not right in law.
- d* Mr. Ho in answer to the submissions of Datuk Primus contended that two significant points should be noted, namely, whether the plaintiffs were the *bona fide* applicants for the lands and whether the said Power of Attorney was indeed signed by the plaintiffs. It was the stand of George Justine @ Ghani Affandi that the signatures in the said Power of Attorney were that of the plaintiffs.
- e* Mr. Ho went on to say that due to the demand for RM5,000 by the plaintiffs they should now be estopped from denying that the signatures were not theirs.
- f* On the point of hearsay Mr. Ho said that the matters raised in the affidavits were within the personal knowledge of George Justine @ Ghani Affandi as for instance the meeting with Ng.
- g* And s. 85 of the Evidence Act was referred to as well to say that the said Power of Attorney must be presumed to have been executed and authenticated by the Commissioner for Oaths unless rebutted.
- h* Mr. Cheng submitted that there was a wrong assumption that the said Power of Attorney was made on 11 November 1991. He pointed out that the stamping was 5 November 1991, registered on 14 November 1991 with the Sandakan Magistrates Court and with the Central Land Office on 11 December 1998. Learned counsel argued that the said Power of Attorney could have been made before 11 November 1991. And since the words 'nineteen hundred eighty six' appeared on page one of the said Power of Attorney it could have been made that year. Learned counsel also relied on s. 85 of the Evidence Act 1950 to support his contention that the said Power of Attorney must be presumed to be valid until rebutted.
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It was also contended by Mr. Cheng that there was not an iota of evidence tendered by the plaintiffs that Jasutera Sdn Bhd had any role in the alleged forgery or fraud.

Mr. Roderick Fernandez learned counsel for Campo Sdn. Bhd. took similar arguments as given by the other two counsel in saying that the said Power of Attorney should not be ruled as forgery and that it was for the plaintiffs to prove on the balance of probabilities that the signatures were forged.

Findings

Whether the signatures of the plaintiffs in the said Power of Attorney were forged or not such fact would have to rest on the plaintiffs and George Justine @ Ghani Affandi and anyone who might have personal knowledge on its execution. I do not think Jasutera Sdn Bhd or Compo Sdn Bhd would be in the position at all to know how the signatures came into the said Power of Attorney since that happened before they were involved. Hence, whatever might be their assertion it would be very much a conjecture.

Now, here is a case of where the plaintiffs denied the signatures in the said Power of Attorney were theirs. And the denials were not bare but supported by circumstantial evidence such as Ng lodging a police report and a caveat with statutory declaration annexed. Further in respect of the first action the subsequent conduct of George Justine @ Ghani Affandi in coming to visit Ng and then issuing the letter (JN8) to his solicitors to inform about the purported settlement gave an irresistible inference that George Justine @ Ghani Affandi was greatly disturbed by the discovery of his dealing with the lands. And it is trite law that conduct of a person can be corroborative evidence. (See: *Dowse v. Attorney-General, Federation of Malaya* [1961] MLJ 249). Meanwhile George Justine @ Ghani Affandi referred to the visit in para. 11 of his affidavit in opposition but would appear to contradict the content of JN8. In his affidavit George Justine @ Ghani Affandi gave the impression that during the visit the issue of forgery did not arise but only on the pricing. If that was true then he had no reason to promptly inform the solicitors of Ng as he did nothing wrong in selling at the price he agreed. After all he was a donee of an unconditional Power of Attorney. I also note that even the date of JN8 was given as 5 March 1998 when the visit was on 12 April 1998. Indeed George Justine @ Ghani Affandi could have also denied the forgery as alleged in the statutory declaration of Ng in support of his caveat lodged in respect of the land in question. He failed to do that as well.

- a* As regards the second action it was the assertion of Vera that she did not sign the said Power of Attorney and that she could not have done so since she was in Tawau at the material time. She also asserted that she never knew or met either George Justine @ Ghani Affandi or Ahmad Read. And when she was contacted by Ng she endorsed his action of reporting to the police and lodging the caveat.
- b*

- The only rebuttal George Justine @ Ghani Affandi gave was that it was his uncle who obtained the signatures. However the uncle never gave an affidavit in support of that assertion. And since it is George Justine @ Ghani Affandi that is making the assertion the burden is therefore upon him to prove such fact – see: s. 101 of the Evidence Act. In my view he failed to do so. In fact he never asserted that he had personal knowledge of how the purported signatures of the plaintiffs were obtained or came into the said Power of Attorney. There was also no other circumstantial evidence adverted to by George Justine @ Ghani Affandi which could indicate the probability of the plaintiffs having signed on the said Power of Attorney and that their denials were false.
- c*
- d*

- Since there is a direct denial by the plaintiffs of their purported signatures in the said Power of Attorney and supported by circumstantial evidence as alluded to herein including the subsequent conduct of George Justine @ Ghani Affandi, I do not think it is reasonable and there is no legal obligation on their part to lead evidence in the form of an expert opinion in order to disavow the impugned signatures. After all an expert opinion would only be there to assist the court to come to an opinion or a finding of fact and not to be taken as conclusive of such fact. (See: *Dr Shanmuganathan v. Periasamy s/o Sithambaram Filial* [1997] 3 MLJ 6). Indeed there was even a blatant admission by George Justine @ Ghani Affandi that he was responsible in the forging of the purported signature of his late father in the said Power of Attorney but on the advice of the Commissioner for Oaths. Unfortunately for him there was no evidence adduced or legal principle expounded to support his excuse.
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- A question may be asked whether a mere denial of a signature by a person is sufficient. In the case of *Gian Singh & Co Ltd v. Banque De L'Indochine* [1974] 2 MLJ 177 PC Lord Diplock, when agreeing with the Singapore Court of Appeal in reversing the finding of the High Court and finding that there was forgery, had this to say at p. 177:
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But, in the instant case, the only direct evidence as to whether the signature on the certificate was genuine or not was that of Balwant Singh. There was no evidence which conflicted with it except the judge's own impression that the signature on the certificate was much like a specimen of Balwant Singh's signature which was admittedly genuine. This, however, is a common feature of successful forgeries, and it is notoriously dangerous for judges, in the absence of expert evidence, to rely upon their own impression as to whether two signatures are by the same hand. Nevertheless if there had been no circumstantial evidence to support the bare denial by Balwant Singh that he had signed the certificate, it might well have been improper for the Court of Appeal to reverse the judge's finding. In their Lordships' view, however, there was powerful circumstantial evidence corroborating the direct evidence of Balwant Singh which it is clear the judge had overlooked in making up his mind as to the credibility of Balwant Singh's evidence on the issue of forgery.

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Similarly in the present actions it is not only the direct denials by the plaintiffs but there are circumstantial evidence as well. Further, I am also inclined to agree with learned counsel for the plaintiffs in these two actions that all George Justine @ Ghani Affandi said in his affidavits in respect of the making of the said Power of Attorney was to relate what he claimed to have been told by his mother and that surely would be an obvious hearsay. His mother in these two actions did not file any affidavit to support his assertion. Thus that aspect of his affidavit proves nothing. On this account alone that I can conclude that I prefer the version of the plaintiffs.

*d**e*

As regards the relevance of s. 85 of the Evidence Act it is a rebuttable presumption. And in the first two actions the plaintiffs themselves came forward to deny that the signatures were theirs. It would be unreasonable to expect them to do more unless George Justine @ Ghani Affandi could show by evidence that their denials could not be sustained. I would therefore say that for these two actions the presumption of that section has been successful rebutted.

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It was highlighted that in the said Power of Attorney the words 'nineteen hundred and eighty six' appeared. It was then submitted that it must have been made in that year and not in 1991. And it was by conjecture to say that the plaintiffs could have signed the said Power of Attorney on any other date and not necessarily on 11 November 1991.

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My short answer to that contention is that in the first place George Justine @ Ghani Affandi never asserted that the said Power of Attorney was prepared in 1986. And from his affidavits filed in respect of these first two actions he appeared to say to the contrary. Paragraph 6 of his affidavit in the first action and repeated in the second action states, *inter alia*:

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- a* 7 am informed by my mother and verily believe that sometime in 1991, she was informed by a third party that the names of the other 15 land applicants – which jointly applied for the 500 acres of land more or less in Beluran Sandakan comprised also of Vera Primus ... To the best of her recollection, my mother was quite sure that these names did not feature in the original application for the lands .../ am informed that in order not to further complicate the processing and issuance of the land titles, it was suggested to her that it would be simpler to get these other land applicants to agree to execute a Power of Attorney in respect of the lands applied for in favour of me since I was her son rather than try to resolve who are or are not the original land applicants. She requested Francis Angkangon to arrange for the land applicants to execute a Power of Attorney in my favour as donee to facilitate the application for the lands to be processed and to sort out the preliminary matters thereto.
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It is therefore obvious that the idea of having a power of attorney done was hatched in 1991 ‘in order not to further complicate the processing and issuance of the land titles’. Hence, the presence of those words now relied upon is quite irrelevant. There might have been a basis if there was an assertion to that effect by the person, namely Francis Angkangon, who was engaged to secure the purported signatures in the said Power of Attorney.

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And in para. 14 of his affidavit filed in respect of the first action George Justine @ Ghani Affandi said this:

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... As I was the beneficiary to my father’s land I signed the Power of Attorney on behalf of my late father. The Commissioner for Oaths told me I could do so in 1991.

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It is obvious that it was only in 1991 that George Justine @ Ghani Affandi signed on the said Power of Attorney. This is an admission that there is at least one forged signature in the said Power of Attorney. Whether that has any effect on the validity of the said Power of Attorney as a whole will be considered later. Meanwhile when signing on behalf of his late father in 1991 George Justine @ Ghani Affandi must have seen its status then, that is, whether there were already signatures of the others at that time. He said nothing on the point when that would have been within his personal knowledge. I would say that s. 114(g) of the Evidence Act should be appropriately invoked against him in this instance.

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The other argument raised is the fact that the plaintiffs or their solicitors made a demand for payment and hence it was submitted that they should now be estopped from denying the authenticity of their signatures in the said Power of Attorney.

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With respect I am inclined to agree with learned counsel for the plaintiffs that the demand was only an attempt to settle the matter amicably. Indeed it was in response to the letter from George Justine @ Ghani Affandi (JN8) which informed the solicitors of Ng that the matter had been settled 'outside of court'. And there is much weight in the submission that JN8 is not consistent with the averment in para. 11 of George Justine @ Ghani Affandi's affidavit. My reading of JN8 is that there was a settlement reached. However in para. 11 George Justine @ Ghani Affandi seemed to imply that there was more than just a settlement as disclosed in JN8. I am therefore inclined to agree with Datuk Primus that if it was just a matter of the price then there was nothing Ng could do and George Justine @ Ghani Affandi would have nothing to settle with Ng. I do not think this is an appropriate case for George Justine @ Ghani Affandi to raise estoppel without more.

Thus for these first two actions it is my finding of fact and I am satisfied on the balance of probabilities that the purported signatures of the plaintiffs in the said Power of Attorney were forged. I need not have to make a finding of who did it. And it would be sufficiently proved if it is on the balance of probabilities. (See: *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133). Prayer 1 is therefore appropriate to grant for these two actions.

(ii) The Last Two Actions

The Contentions

There is no dispute that in these two actions the persons named in the said Power of Attorney are the deceased who were already dead in 1991. In fact in para. 11 of his affidavit in opposition filed in respect of the third action George Justine @ Ghani Affandi stated that he was aware of the death of the deceased and he did not know who amongst the beneficiaries to their respective Estates signed on the said Power of Attorney on their behalves.

And the fact that the deceased were already dead in 1991 became the thrust of Datuk Primus's contention. It was submitted that such fact should be taken a conclusive proof that there was forgery. The case of *Jamaliah bte Hj. Mahsudi & Ors v. Sivam a/l Munsamy & Ors* [1999] 5 MLJ 729 was cited to support the argument. And it was also highlighted that George Justine @ Ghani Affandi never denied that the purported signatures of deceased were not theirs. Everything was pushed to his uncle who did not make any affidavit to corroborate his version.

- a* For George Justine @ Ghani Affandi, Mr. Ho submitted that the deceased could have signed on the said Power of Attorney before their deaths as the document must have been prepared in 1986 due to the presence of the words 'nineteen hundred and eighty six' therein.
- b* For Jasutera Sdn. Bhd. Mr. Cheng submitted that the said Power of Attorney could have been made before 11 November 1991. He relied on the presence of the words 'nineteen hundred eighty six' on page one of the said Power of Attorney to say it could have been made that year which would not then be inconsistent with the version of the plaintiffs as to the time of the death of the deceased.
- c* Mr. Cheng also raised the point that in Sabah the common law as to the execution of a power of attorney should apply. One principle he highlighted was that a power of attorney would only be good from the time of its delivery and not from the day of its stated execution. He gave a litany of reasons why the case of *Jamaliah (supra)* should not be followed.
- d* Mr. Feranadez in his submission said that the deceased could have signed the said Power of Attorney before their respective deaths. And he adopted the argument of Mr. Cheng to say that the said Power of Attorney must have been prepared in 1986 in view of the presence of the words 'nineteen hundred and eighty six' therein.
- e* Section 85 of the Evidence Act was also relied upon by all the learned counsel to insist that the signatures were not forged.

Findings

- f* In my view the fact that the deceased were already dead in 1991 should give an irresistible conclusion that their purported signatures in the said Power of Attorney must have been forged. And despite the lengthy submission by Mr. Cheng on why this court should not follow the reasoning in *Jamaliah (supra)*, I am inclined to agree with Datuk Primus that the principle stated therein as to the effect of death and the execution of the power of attorney should be applied and I do so.
- g* But learned counsel argued that they could have signed in 1986 and before their deaths relying on the presence of the words 'nineteen hundred and eighty six' therein.
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With respect I am unable to agree for the following reasons:

- (i) it was in the affidavit of George Justine @ Ghani Affandi that the signatures of the deceased could have been done by one of the beneficiaries of their Estates in the same way as he did for his late father. George Justine @ Ghani Affandi at no time ever said that the said Power of Attorney was prepared in 1986; a
- (ii) as I have stated earlier it is more probable than not that the said Power of Attorney was only done in 1991. That could be inferred from what George Justine @ Ghani Affandi had stated in his affidavit in that he was advised by the Commissioner for Oaths in 1991 that he could sign for his late father. He would have been the best person to know the status of the said Power of Attorney at that time. But he chose silence; b
- (iii) there was no affidavit from Francis Angkangon the uncle of George Justine @ Ghani Affandi who was tasked to get the signatures of the land applicants. And it was made clear by George Justine @ Ghani Affandi that it was only in 1991 that his mother was informed on the presence of 'strangers' amongst the land applicants which originally were confined to 'family members only'; c
- (iv) the mother of George Justine @ Ghani Affandi in her affidavit failed to mention when she asked Francis Angkangon, her brother-in-law, to get the signatures of the land applicants. But George Justine @ Ghani Affandi affirmed that she came to know of the presence of non-family members amongst the land applicants only in 1991 and that was not refuted; and d
- (v) paragraph 7 of the affidavit in support of Ungot was not rebutted in that the deceased, the late Kusiah bte Anggawai was illiterate and could not read or write or even signed her own name. This assertion must be deemed to have been admitted. (See: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). e

For completeness the reasons for my findings in respect of the first two actions are equally applicable to these last two actions.

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a Accordingly in respect of these last two actions it is my finding of fact and I am satisfied on the balance of probabilities that the purported signatures of the deceased in the said Power of Attorney were forged. (See: *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng (supra)*). Prayer 1 should also be granted for these last two actions.

b **Subsidiary Issues**

In view of my findings on the status of the signatures of the plaintiffs and the deceased in these actions I should next consider the appropriate relief or order to be made in the circumstances. However there are several sub-issues raised in the course of the arguments which I should address first. There are:

- c* (i) whether Ungot had the *locus standi* to commence the action since he did not have the 'Jadual Tiga', that is, the Letters of Administration, at the material time;
- d* (ii) the actual date of the said Power of Attorney;
- (iii) the original applicants for the lands;
- (iv) whether the presence of one forged signature in the said Power of Attorney would nullify it in entirety; and
- e* (v) whether the limitation period in respect of the last two actions had set in when the actions were commenced.

Locus Standi

f It is not disputed that at the commencement of the third action the 'Jadual Tiga', which is equivalent to Letters of Administration, was yet to be issued to Ungot though he had applied. It was only issued on 2 October 2000. And it was the absence of such document that led to the argument that Ungot did not have the *locus standi* at the material time.

g Datuk Primus submitted that the absence of the document was not fatal since the action was intended to protect the estate of the deceased. He relied on several authorities to substantiate his argument.

h It is plain in the third action that when commencing it Ungot described himself as the 'Personal Representative of Kusiah bte Angawai'. And he also stated that he had the consent of all his siblings except Urah bte Linitok the mother of George Justine @ Ghani Affandi. Meanwhile Mr. Ho and Mr. Cheng contended that such status did not give Ungot the standing to commence the action since he had no capacity as the administrator of the estate of the deceased. It was also submitted that the question of protecting the interest of

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the estate did not arise as there was no evidence adduced to show that Ungot was a dependant or a minor of the deceased at the material time. Learned counsel's suggested solution was that the action should be withdrawn and re-filed or at least to apply for amendment which was not done.

The early jurisprudence on this issue is that one must have a Letters of Administration before commencing an action on behalf of an estate. Thus in the case of *Chai Koi v. Wong Yit Chen & Anor* [1964] MLJ 441 where the action was filed to claim for compensation arising from the death of the deceased in an accident it was held that '(T)he deceased's father, too, had no *locus standi* as the grant of letters of administration had not yet been issued to him.' And where a person was sued as a defendant before the grant of letters of administration it was also held that the defendant could not be sued since at the time of the suit he was yet to be made the administrator of the estate. (See: *Comptroller of Income Tax v. Van Tai Min* [1965] 1 MLJ 255 HC). However in *Ooi Jim & Anor v. Ai Eit & Ors* [1977] 2 MLJ 105 the then Federal Court held that 'it was not necessary for the first plaintiff to take out such letters of administration in order to bring this action which was primarily an action for a declaration as to the status of her husband. Declaratory proceedings are often the most convenient and sometimes the only possible mode of determining status. The question of taking out letters of administration would only arise when it became necessary for the first plaintiff to claim her share in the estate of the said intestate.'

In the third action Ungot is only seeking for a declaration on the status of the signature of the deceased with the consequential relief sought for in that the title deed issued pursuant to the said Power of Attorney, if the signature is declared forged, should be cancelled. There is no specific relief such as damages, being sought for. Thus I am inclined to follow the ratio in *Ooi Jim (supra)* and rule that Ungot had the *locus standi* to commence the action. Moreover, it is to be noted that the early cases were before the inception of the present Rules of the High Court 1980 wherein additional provisions such as O. 20 are more liberal. There was also no submission that the absence of the 'Jadual Tiga' at the commencement of the action had substantially prejudiced any of the defendants or the third party. Accordingly I find no merit in this issue of *locus standi*.

a Date Of The Said Power Of Attorney

I have already partially dealt with this issue. The presence of the words 'nineteen hundred and eighty six' in the said Power of Attorney became the focal point of learned counsel opposing these actions to say that it must have been prepared and signed by the deceased in 1986 and that the date therein was merely inserted for convenience.

b In addition to what I have said earlier on this issue I am also inclined to agree with Datuk Primus on the following points:

- c** (i) that the 1991 date was relied on in all the documents entered between George Justine @ Ghani Affandi and the purchasers of the lands and as such they should be estopped from denying that date;
- (ii) that even if it was 1986 both the deceased died earlier than November of that year; and
- d** (iii) that the assertion was not proved by George Justine @ Ghani Affandi, Jasutera Sdn Bhd or Campo Sdn Bhd.

Accordingly I find no merit on this issue of the date of the said Power of Attorney and on the material before me I am satisfied on the balance of probabilities that it must have been prepared in 1991.

e The Original Applicants Of The Lands

It was also the submissions of learned counsel for the defendants that Ng and Vera were not the original applicants for the lands. As for the deceased in the third and fourth actions the mother of George Justine @ Ghani Affandi could not remember if they were amongst the original applicants. Campo Sdn Bhd also produced copies of land applications in its affidavit to show that the plaintiffs were not the *bona fide* applicants and that their signatures in those documents did not tally with their own signatures.

f In reply Datuk Primus contended that the defendants should be estopped from raising this issue since the documents they had entered into with George Justine @ Ghani Affandi referred to the plaintiffs and the deceased as the successful land applicants. He also argued that it was for the defendants to prove such assertion which they had failed and that the names in the land titles bore that of the plaintiffs and the deceased.

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With respect I am not clear on the relevance of this point in relation to the forgery of the signatures in the said Power of Attorney. Further I fail to see in what capacity the defendants are raising this issue. If there is any party complaining it should be the alienating authority of the State. And even assuming that the plaintiffs and the deceased were not the *bona fide* applicants it was not shown who should have been the original applicants. Otherwise if the defendants were right and since no other applicants were referred to, it should be assumed that there were no proper applications made for the lands thereby making the issuance of the title deeds improper and not in compliance with the provisions of the Sabah Land Ordinance. In such instance there would have been a fraud committed on the alienating authority and hence the title deeds issued should therefore be rightly cancelled notwithstanding all the payments made for their issuance. Anyway, if necessary I will deal with this point in greater detail later.

But to answer the issue I would think that s. 114(e) of the Evidence Act is relevant. Since the title deeds were originally issued in the names of the Ng, Vera and the deceased it must be presumed that they were the original land applicants.

Whether The Presence Of One Forged Signature In The Said Power Of Attorney Would Nullify In Its Entirety

This issue was raised by Datuk Primus primarily to take advantage of the admission by George Justine @ Ghani Affandi that he signed on the said Power of Attorney on behalf of his late father. He took the analogy of a joint guarantee where the law is clear in that one forged signature would render the document defective in law.

On this issue however I am inclined to agree with the contention of learned counsel for the defendants that the law on guarantee should not apply since the document being dealt with is a power of attorney. It is an authority given individually by the donors to the donee. In any event I do not think this issue has any significance in view of my findings on the respective signatures of the plaintiffs and the deceased.

Whether The Last Two Actions Are Statute-Barred

It is the submissions of learned counsel for the defendants that Ng came to know of the forgery of the signatures was on 27 June 1996. It was therefore argued that the plaintiffs must be taken as acting in group so that the knowledge of Ng should be imputed on the others. And since the last two actions were only filed in July and October 2000 respectively they were caught by the three years limitation period under the Sabah Limitation Ordinance.

- a* Datuk Primus in reply submitted that the last act on the use of the forged instrument should be taken into account and in this case the Memoranda of Transfer were dated 24 November 1998 though signed in escrow. Hence the two actions were well within the three years period. With respect, I do not think that is correct as the period should begin to run from the time ‘the facts
- b* entitling the plaintiff to have the instrument cancelled or set aside become known to him’ – item 73 of the Schedule of the said Ordinance.

- Anyway, I note that it was only Ng that came to know of the forgery in June 1996. At that point in time there was no assertion from Ng that he was acting for the others as well. And although he attempted to lodge caveats for all the
- c* land applicants that act in my view was inconsequential. He was never authorized to do so by the others.

- The crucial point is when was the forgery came to the knowledge of the plaintiffs in the last two actions. From their affidavits filed in support both
- d* asserted that they were only told in early of 1998. In the case of Sado he stated that he was only informed in March 1998. There was no rebuttal from the defendants on this assertion and they must be deemed to have admitted the same. Thus calculating from that period the actions are well within the three years period. I do not think it can be reasonably averred that the knowledge of Ng should be imputed on them. There was no proof shown by
- e* the defendants that Ng was already acting on their behalves in 1996.

There is therefore no merit on this issue as raised by the defendants.

The Reliefs

- f* The plaintiffs are asking for a consequential order in that all acts done pursuant to the said Power of Attorney should be nullified and that the title deeds issued should be cancelled by the Director of Lands and Surveys Department Sabah.

- In respect of the second limb of the order sought for it should only be confined to the title deeds issued under the names of the plaintiffs and the deceased.
- g* Further, I note that the Director is not a party in these actions. It would therefore quite unfair to compel him to comply with a court order made without his presence. That has been stated in *Majumder v. Attorney-General of Sarawak* [1969] 1 MLJ 132 where Lord Guest rendering an opinion of the Privy Council said this at p. 134:

- h* There is a further objection to the granting of this declaration that, in the terms of clause 1, a “designated officer” means an officer designated as such by the Secretary of State. The Secretary of State is not a party to these proceedings and moreover it is entirely within his discretion as to whether he designates an officer as such or not. He would not be compelled to do so.

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Meanwhile, as noted earlier the defendants submitted that the plaintiffs in the first two actions were not the original and *bona fide* applicants for the lands and they were uncertain if the deceased were in the group of the original applicants. No evidence adduced as to who were the rightful applicants. Such stand in my view tantamount to admitting that there was a failure to comply with the relevant provisions pertaining to alienation of land under the Sabah Land Ordinance. The inevitable conclusion would then be that the alienation process of the lands to Ng, Vera and the deceased should be declared *void ab initio*. It would then be not even necessary to consider the effect of the forgery of their signatures in the said Power of Attorney when making such order. Further, the question of *bona fide* purchasers for value without notice would not be relevant as well since in the first place there was nothing to sell. And that should finally determine these actions without more.

But to simply accept the implied admission by the defendants could prejudice the plaintiffs who are not seeking to nullify the approval of the land applications. Up to the stage of approval the plaintiffs are not disputing. It is only the issuance of the issue documents of title, asserting that these were the fruits of the impugned said Power of Attorney. And since the title deeds were issued separately under the respective names of the plaintiffs and the deceased the genuineness of the other signatures in the said Power of Attorney should not prevent the making of an order to cancel those issue documents of title which were secured vide forged signatures. I am therefore unable to agree with the contention of Mr. Ho that the lands applied for were in 'one block' and subsequently 'subdivided' into lots. There was no evidence led to that effect. Thus, the inevitable conclusion is that each of the land applicants applied individually although they might have submitted their applications as a group.

Datuk Primus in his submission urged this court to make the order as prayed for and highlighting the conduct of Jasutera Sdn Bhd in proceeding with the transfers of all the lands except the parcel under the name of Ng despite being informed of the adverse claim on 4 March 1998. He contended that such fact should be taken into account when considering the claim of being a *bona fide* purchaser for value without notice. It was also submitted that the common law principle of *nemo dat quod non habet* (that no person can give a better title than he had) should apply in Sabah since there is no provision under the Sabah Land Ordinance pertaining to indefeasibility of title.

- a* Mr. Fernandez, while conceding that the common law principle as adverted to hereinabove applies in Sabah, went on to submit, *inter alia*, that even if the signatures of Ng, Vera and the deceased in the said Power of Attorney were forged, Campo Sdn Bhd and in turn Jasutera Sdn Bhd, had acquired good title to the lands by virtue of being *bona fide* purchasers for value without notice of the said forgery at the material time. And he argued that the doctrine of *bona fide* purchaser for value without notice applies in Sabah and that it should be considered as an exception to the common law principle of *nemo dat quod non habet*. It was stressed that the purchase by Campo Sdn. Bhd. took place in 1996 while the information on the alleged forgery was only communicated to Jasutera Sdn. Bhd. on 4 March 1998. In addition it was also submitted that George Justine @ Ghani Affandi misrepresented to Campo Sdn. Bhd. that the said Power of Attorney was in order at the time of sale.

- d* Mr. Cheng in his lengthy submissions took the same line of argument as that of Mr. Fernandez. But he emphasized that the plaintiffs did nothing to secure the title deeds and that 'the most amazing fact is that the plaintiff got on to the register of titles through the very same Power of Attorney'. All costs were paid by his client and it even managed to comply with the terms and conditions in the title deeds including developing the lands thereby making the first transfer of ownership possible.

- e* Mr. Ho submitted that the said Power of Attorney should be taken as valid until declared otherwise by a Court of Law. And he refuted any allegation that his client misrepresented the validity of the said Power of Attorney citing that the signatures were obtained by the uncle of his client who should therefore be entitled to assume that all the signatures therein were in order.

- f* Foremost to note is the distinction between land approval and the issued document of title. Subject to payment of all fees due and the fulfillment of such other conditions as stipulated upon approval of a land application it is my view that a land approval only creates a contractual relationship between an alienating authority and a successful land applicant. In the case of *Tee Say Poh v. Jais bin Haji Salleh* [1939] MLJ 330 Mills J expressed a similar view at p. 332:
- g*

- h* Moreover, I am in grave doubt whether the English rule of equity applies in the present case, for it only applies to contracts for sale of land, whereas the land now in question is State land and Yas, in obtaining approval to occupy, obtained not land but only contractual rights against the State.

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And in *Chong Pak Kwan @ Chong Shiu Fai v. Kong Chung Loi (a), Kong Sung Loi & Others* [2002] MLJU 435 I did express the same opinion when I said thus:

7 think it is quite a settled law that contractual rights can be created involving approved land application ...

Hence I would say that an approval must have been obtained at that point in time. Since the land applications were approved there should therefore be 'rights' conferred at the material time capable of being a subject matter of a contract.

Reverting therefore to the present actions and leaving aside for the moment the contention that the plaintiffs and the deceased were not the *bona fide* original land applicants, it is not in dispute that approvals were granted in respect of the land applications to Ng, Vera and the deceased. Thus, at that stage and on the assumption that all dues were paid and the offers were accepted, it would be correct in law to say that there were contractual relationships between them and the approving authority. However, acts done pursuant to the said Power of Attorney should be excluded due to the forged signatures.

Now, the procedure in land alienation is that upon obtaining approval an applicant is required to take some further steps before an issued document of title can be obtained. For instance, besides payments of all dues, survey works must also be carried out and all relevant official documents, including a draft issued document of title, must be signed to signify the acceptance of all the terms and conditions therein. Thus, if the signing of such documents was done by a person who was not authorized by a successful land applicant, the latter could not be expected to be bound by those terms and conditions since such act was not his. In short, the issued document of title would have been issued not in compliance with the provisions of the statute.

With my finding of forgery of the signatures of Ng, Vera and the deceased in the said Power of Attorney and the use of that instrument by George Justine @ Ghani Affandi or his purported substitute *vide* a substituted power of attorney to secure the issuance of the issued document of title, the inescapable conclusion is that those acts would not be that of Ng, Vera or the deceased. It follows therefore that I should grant prayer 2 in the respective originating summons and I do so accordingly.

a Bona Fide Purchasers

However, there is still a question of the position of Campo Sdn Bhd and in turn that of Jasutera Sdn Bhd. on the claim of being a *bona fide* purchaser for value without notice.

- b** In view of my foregoing findings I do not think the doctrine of *bona fide* purchaser for value without notice can be relied upon. Further, at the time of entering into the sale agreement it is not in dispute that the issue documents of title had not been issued by the Lands and Surveys Department. Hence, at that point in time the subject matter of the agreement was, at best, only the contractual rights of the land applicants since there was no title to purchase
- c** as yet. Section 88 of the Sabah Land Ordinance states:

88. No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provision of this Part.

- d** The position of Campo Sdn. Bhd. and Jasutera Sdn. Bhd. is further weakened on their reliance of the doctrine because it is not in dispute that before the issuance of the issue documents of title Jasutera Sdn. Bhd. was informed and in fact a caveat was lodged by Ng. Unfortunately it proceeded to ask for the
- e** issuance and registration obviously with the hope of acquiring good title notwithstanding the claim of forgery of signatures in the said Power of Attorney. On that score I am therefore unable to see how it can be said that such manner of acquisition of title on the lands can be said to be without notice.

- f** In any event in view of the forgery in the said Power of Attorney George Justine @ Ghani Affandi was not authorized to enter into the sale agreement with Campo Sdn. Bhd. on behalf of Ng, Vera and the deceased. Accordingly that purported sale agreement is void. Thus, the doctrine of *bona fide* purchaser for value without notice does not even come into play.

g Third Parties And Indemnity

On this issue I note the agreement of the parties as stated earlier on. They should therefore seek further direction from the Deputy Registrar, High Court Sandakan. And that should include the issue of whether George Justine @ Ghani Affandi misrepresented to Campo Sdn. Bhd. If I may suggest the present

h Resident Judge of the High Court Sandakan should be able to dispose of the remaining issues.

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Conclusion

I have considered the other points raised by the parties in the course of arguments but they do not alter any of my findings hereinabove. To sum up I therefore grant the following to each of the plaintiffs:

1. That the Power of Attorney dated 11 November 1991 is hereby declared null and void.
2. That all consequential acts made or purported to be made or carried in pursuant to the abovesaid Power of Attorney are hereby declared null and void and of no consequence.
3. Costs to the plaintiffs to be taxed and to be paid by the defendants.

And as indicated earlier, I am unable to grant prayer 3 since the party expected to comply with such order is not before the court. At any rate in view of my finding that the issue documents of title were the products of the said forged Power of Attorney I do not think the question of canceling them arises. It should be understood that they convey nothing.

*a**b**c**d**e**f**g**h**i*